United States Court of Appeals

for the Second Circuit

APPENDIX

76-2025

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIGOVERTO GARCIA,

Appellant,

-against-

[redacted]2

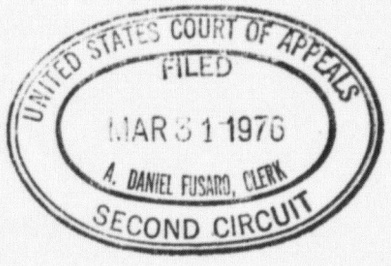
VITO TERNULLO, Superintendent,

Appellee.

B
P/S

APPENDIX TO APPELLANT'S BRIEF

FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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PLAINTIFFS

GARCIA, RIGOVERTO, U.S.A. ex rel.

FILED: 1/14/76

DEFENDANTS

TERNULLO, VITO, Supt. Matteawan State Hospital

CAUSE

WRIT OF HABEAS CORPUS
28 USC 2241

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75-2852 U.S.A. ex rel., Rigoverto Garcia -V- Vito Ternullo, Supt. Matteawan Ho.

DATE	NR.	PROCEEDINGS
06-13-75	1	Filed petition for writ of habeas corpus.
06-13-75	2	Filed order granting petitioner to proceed in forma pauperis, Gagliardi
07-02-75	3	Filed respondent's (Rhonda Amkraut Bayer) affdvt. in opposition to petitioner's application for writ of habeas corpus.
11-10-75	4	Filed notice of assignment to Brieant, J.
12-11-75	5	Filed Memoandum & Order#43522.....Petitioner has not sustained the burden of proving that his statement was involuntary. Peition denied...So Ordered..Breiant,J. (Prose ck mn)
12-12-75		Filed Letter from Dept of Law NY State, L.J Kefkowitz's office to Judge Brieant dtd 12-1-75 with copy of brief ~~xxxxx~~ attached.
1-16-76		Fld Memo Endd——The within proceeding was resolved adversely to petitioner in the Dist.Court upon the merits, and accordingly, I certify that there is probable cause to maintain this appeal....Brieant,J.
1-16-76		Fld Peitioner's Notice of Appeal to USCA from order dismissing the petition... .....Copyes of Appeal maibed by Pro Se Clerk.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By M. Gant
Deputy Clerk

B

THE COURT: Motion to suppress statement or declaration made by the defendant that the place--

after he had been placed under arrest the Court finds that detective Kerins did in fact give the defendant his rights re remaining silent, and the Court finds that the defendant did understand those admonitions or rights and I find that the statement in addition and/or declaration were voluntary beyond a reasonable doubt. People have met their burden of proof re the statements were voluntary.

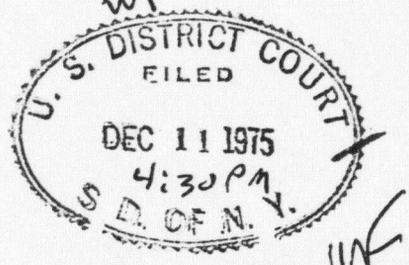
Accordingly, motion to suppress statements denied.

All right, gentlemen, eleven o'clock tomorrow, gentlemen.

(Whereupon, the case was adjourned until eleven o'clock, June 6, 1973.)

ORIGINAL

mem & decision & order



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
RIGOVERTO GARCIA,

Petitioner,

-against-

VITO TERNULLO, Superintendent,
Matteawan State Hospital,

Respondent.

----------X

Pro Se 75 Civ. 2852-CLB

MEMORANDUM AND ORDER

42522

Brieant, J.

Petitioner, a state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. §§2241, et seq., claiming that a statement made by him during custodial interrogation and held admissible at a pre-trial Huntley hearing was in fact involuntary. This Court has jurisdiction of the petition under 28 U.S.C. §2254.

Petitioner was arrested at approximately Noon on May 28, 1972 in connection with a shooting which had occurred early in the morning of the same day. His arrest was made as the result of identification given from his hospital bed by the victim of the shooting.

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The testimony of the arresting officer at the Huntley hearing established that upon petitioner's arrest he was warned that he had a right to remain silent and to have counsel appointed and that anything he said could be used against him. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). Petitioner indicated that he understood the warnings and when asked if he wanted to respond to further questioning, answered affirmatively. See Tr. pp. 47, 57, 58. The arresting officer testified further that petitioner refused to reveal the location of the gun, and the officers were unable to locate it.

Petitioner was then taken to the hospital where he was identified by the victim. He was next taken to the 43rd Precinct for further questioning and booking. No further warnings were given. The arresting officer read to petitioner the potential sentence for the crime and told petitioner that "if he wanted to help himself and give up the gun that we would bring it to the attention--we made no promises to him--...of the D.A. and the judge." (Tr. p. 48). Shortly thereafter, according to Detective Kerins, petitioner made the claimed involuntary statement: "If I give up the gun, will

I blow my whole case?" [sic in Tr. p. 48, but petitioner says his statement was: "If I give up the gun I will blow my whole case."] The questioning and processing at the station house up to the time of the incriminating statement took approximately 30 to 45 minutes. (Tr. p. 63).

At the hearing, petitioner's motion to suppress admission of the statement at trial was denied. He subsequently pleaded guilty to assault in the first degree and was sentenced to an indeterminate sentence, maximum of ten years. (Tr. p. 161).

Petitioner appealed his conviction to the First Department of the Appellate Division of the New York Supreme Court, which affirmed the conviction unanimously without opinion. 366 N.Y.S.2d 359 (1975). Petitioner's application for a certificate granting leave to appeal was denied by the New York Court of Appeals on March 18, 1975.

Petitioner has satisfied the initial requirement of 28 U.S.C. §2254(b), and has exhausted the state remedies available to him by raising the claim that his statement was involuntary in the state courts on direct appeal. United States ex rel. Weinstein v.

Fay, 333 F.2d 815, 819 (1964); Ralls v. Manson, 375 F.Supp. 1271, 1282 (D. Conn. 1975).

Petitioner argues that the undisputed facts compel an inference that the statement he made during custodial interrogation was involuntary and should have been held inadmissible.

Petitioner is not entitled to an evidentiary hearing since the facts are not disputed. Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

The Court is persuaded, upon reviewing the minutes of the Huntley hearing, that the facts support an inference that the statement was voluntarily made. The arresting officer asked petitioner if he wished to submit to questioning. Rather than refuse to answer questions, petitioner responded, in substance, "You're doing the talking." Such a response does not constitute a refusal to answer questions. To the contrary, it would seem to be a solicitation of further questions.

Petitioner did not ask to consult with a lawyer, nor did he indicate a wish to remain silent at any time up to the making of the incriminating statement even though he had been informed of his right to counsel and his right to remain silent.

The police officers did not use physical or psychological force to coerce petitioner into making a statement. He was taken to the hospital for identification due to the serious condition of the victim.

That the officers read to petitioner once the potential sentence he faced if convicted does not compel a conclusion that petitioner was coerced. Petitioner does not claim that any more was "promised" to him than that the fact of his cooperation would be made known to the prosecuting attorney and the trial judge.

Petitioner's counsel cross-examined both witnesses--the victim and the arresting officer--at the state court hearing. The facts were fully developed at a proper hearing.

The Court finds that the record of the state court hearing fully supports the finding of the trial judge that petitioner was advised of his rights, that petitioner understood those rights and that his statement was voluntary. Such finding is presumed correct pursuant to 28 U.S.C. §2254(d), and petitioner here has the burden of proving that the finding was erroneous. United States ex rel. Regina v. LaVallee, 504 F.2d 580 (2d Cir. 1974), cert. denied, 420

U.S. 947 (1975). Petitioner has not sustained the burden of proving that his statement was involuntary. Petition denied.

So Ordered.

Dated: New York, New York
December 11, 1975

Charles L. Brieant, Jr.

CHARLES L. BRIEANT, JR.
U. S. D. J.

CERTIFICATE OF SERVICE

March 31, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Jonathan J. Silbermann